

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN CASCIANI,

Plaintiff,

ORDER

08-CV-6162L

v.

RONALD NESBITT, Town Board Supervisor,
In his Individual and Official capacity,
TOWN OF WEBSTER,

Defendants.

Defendants have moved to dismiss the complaint in this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Dkt. #10). Plaintiff has cross-moved to amend his complaint pursuant to Rule 15(a) (Dkt. #13).

In opposition to the motion to dismiss, plaintiff has submitted numerous materials outside the pleadings, including several affidavits from non-parties. *See* Dkt. #14-2. Plaintiff has also submitted materials outside the pleadings in support of his motion for leave to amend. *See* Dkt. #13.

Although counsel for both sides indicated at oral argument on the pending motions that they viewed defendants' motion as purely a motion to dismiss, it seems to me that the best course of action here is to convert the motion to a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules of Civil Procedure. For one thing, although some of the materials outside the pleadings have ostensibly been submitted in connection with the motion for leave to amend the


complaint, it does not seem realistic to expect the Court to consider those materials only insofar as they relate to the motion to amend, and to ignore them with respect to the motion to dismiss.

Furthermore, in the complaint itself, and in opposition to the motion to dismiss, plaintiff has raised a number of issues concerning defendants' intent, retaliatory and discriminatory animus, and alleged disparate treatment of similarly situated Webster residents. Those issues would best be assessed upon a more complete factual record. Since plaintiff himself has already submitted some matters outside the pleadings, which bear upon those issues, the Court in its discretion will treat defendants' motion as a motion for summary judgment pursuant to Rule 56, and will give the parties an opportunity to present whatever materials they believe are pertinent to the motion.

CONCLUSION

Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, the Court hereby gives the parties notice of its intention to convert defendants' motion to dismiss (Dkt. #10) to a motion for summary judgment under Rule 56. Plaintiff and defendants shall submit, no later than May 11, 2009, any additional materials pertinent to defendants' motion, in accordance with Rule 56(e) of the Federal Rules of Civil Procedure and Rule 56.1 of the Local Rules of Civil Procedure for this district.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
April 17, 2009.